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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-5444

EHRLICH ANTHONY COKER,
Petitioner,

v.

GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 234 Ga. 555, 216 S.E. 2d 782 (1975).

STATEMENT OF THE CASE

On September 2, 1974, three inmates escaped from Ware Correctional Institution near Waycross, Georgia.[1] (A. 80-82). One of the escapees was Ehrlich Coker, the petitioner. (A. 102). Armed with a three-foot long board, the petitioner entered the nearby home of Allen and Elnita Carver, both of whom were sixteen years old. (A. 112, 114, 167, 326). He proceeded to tie up Mr. Carver, steal Mr. Carver's wallet containing $20.30, and rape Mrs. Carver. (A. 114-117, 168-174).

Having armed himself with a steak knife soon after gaining entry to the home, the petitioner abducted Mrs. Carver and fled in the Carvers' automobile. (A. 121, 176). Apprehended approximately fifteen miles away, the petitioner was still armed with the knife and had not released Mrs. Carver as he promised.[2] (A. 208-209).

Charged with armed robbery,[3] rape,[4] kidnapping,[5] motor vehicle theft,[6] and escape,[7] petitioner was tried November 19-22, 1974, in the Superior Court of Ware County.

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[1] Waycross is approximately 75 miles northwest of Jacksonville, Florida.

[2] At the Carver home, the petitioner told Mr. Carver that Mrs. Carver would be released at a gas station in Waresboro. (A. 121, 176). After passing through Waresboro, Mrs. Carver asked if she would be released. The petitioner laughed and responded, " 'When we run out of gas . . . I reckon we'll both get out and start walking.' " (A. 177-78).

[3] Ga. Code Ann. §26-1902 (1972 Rev.).

[4] Ga. Code Ann. §26-2001 (1972 Rev.).

[5] Ga. Code Ann. §26-1311 (1972 Rev.).

[6] Ga. Code Ann. §26-1813(a)(1) (1972 Rev.).

[7] Ga. Code Ann. §26-2501 (1972 Rev.).

Pursuant to his special plea of insanity,[8] on November 19, 1974, a jury found the petitioner competent to stand trial. (A. 75-76). Trial on the general issues began on the morning of the 20th before a second jury. (A. 77). The petitioner was found guilty of each charge on November 21, 1974. (A. 265).

The sentencing phase of the trial began the next morning, before the same jury that returned the guilty verdicts.[9] (A. 266).

Evidence was introduced to show that on December 5, 1971, the petitioner and Phillip Echols raped and stabbed to death Sue Ann Wick.[10] (A. 285-86). Less than eight months later petitioner and Glenn Stacy kidnapped and raped sixteen-year-old Susan Lorrine Jones. (A. 261, 279-80). Petitioner, leaving Stacy behind, took Ms. Jones to an adjoining county where he again raped her. (A. 261, 280). In addition to raping Ms. Jones, he stripped off her clothes, severely beat her with a piece of wood, dragged her into a wooded area and left her for dead.[11] (A. 261, 280, 310).

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[8] *See* Ga. Code Ann. §27-1502 (1972 Rev.).

[9] The procedure that Georgia follows in capital cases is familiar to the Court. *See Gregg v. Georgia*, ——— U.S. ———, 96 S. Ct. 2909, 2920-2922 (1976).

[10] Petitioner entered pleas of guilty in the Superior Court of Clayton County to a two count indictment charging rape and murder. He was sentenced to twenty years imprisonment and life imprisonment, respectively. (A. 308-309). At Echols' trial, Petitioner admitted his involvement but maintained that Echols stabbed Ms. Wick; Echols, on the other hand, maintained that petitioner did the stabbing. *See Echols v. State*, 231 Ga. 633, 634, 203 S.E. 2d 165, 166 (1974).

[11] Petitioner entered pleas of guilty in the Superior Court of Richmond County to a two count indictment charging kidnapping and rape. He was sentenced to twenty years imprisonment and life imprisonment, respectively. (A. 306-307). He entered pleas of guilty in the Superior Court of Taliaferro County to a two count indictment charging aggravated assault and rape and was sentenced to eight years imprisonment and life imprisonment, respectively. (A. 310-312).

After the presentation of evidence,[12] the trial court charged the jury on punishment. The trial court first explained the range of punishment for armed robbery and rape and then charged the jurors that they must find beyond a reasonable doubt one or more statutory aggravating circumstances before the penalty of death would be authorized. (A. 298). The jury was instructed on the relevant statutory aggravating circumstances [13] as follows:

> "Now, as to Count 1, wherein the defendant has been found guilty of Armed Robbery, you may consider the following aggravating circumstances, which you must find existed beyond a reasonable doubt before the death penalty can be imposed:
>
> "1. The offense of Armed Robbery was committed by a person with a prior record of conviction for a capital felony.
>
> "Now, as to Count 2, wherein the defendant has been found guilty of Rape, you may consider one or more of the following aggravating circumstances, which you must find beyond a reasonable doubt before the death penalty can be imposed under Count 2:
>
> "1. The offense of Rape was committed by a person with a prior record of conviction for a capital felony.
>
> "2. The offense of Rape was committed while the offender, the defendant, was engaged in the commission of another capital felony, to wit: The Armed Robbery of Allen Carver, as charged in Count 1 of the indictment." (A. 298-299).

The jury was also given instructions on non-statutory mitigating and aggravating circumstances. (A. 300).

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[12] The petitioner did not offer any evidence. (A. 292).
[13] *See* Ga. Code Ann. §27-2534.1(b)(1), (2) (Supp. 1976).

The jury recommended mercy on the armed robbery count, resulting in a sentence of life imprisonment. (A. 314, 316). On the rape count, the jury found both aggravating circumstances and returned a sentence of death. (A. 315, 317-318).

The Supreme Court of Georgia affirmed the petitioner's conviction and sentence of death for rape. *Coker v. State*, 234 Ga. 555, 216 S.E. 2d 782 (1975). This Court granted certiorari, limited to the issue of whether the imposition of a death sentence under the law of Georgia for the crime of rape violates the Eighth or Fourteenth Amendments of the United States Constitution. _____ U.S. _____ (1976).

SUMMARY OF ARGUMENT

I.

Extreme cases of rape call for extreme sanctions. If the punishment of death is a constitutionally permissible penalty for murder, it should equally be permissible for rape in certain circumstances. The same interests—retribution, deterrence, and incapacitation—that a legislature may rationally conclude justify the death penalty for murder are just as forceful in some rape cases. Some rapes involve such depraved sexual abuse and the infliction of such serious physical injury that death is not a disproportionate, much less grossly disproportionate, punishment. For those who have demonstrated a propensity to commit crimes of this magnitude and who again rape, death is not a disproportionate punishment. The punishment of death for rape is not always an excessive penalty.

II.

"Evolving standards of decency" tolerate the punishment of death for rape in extreme cases. If measured by past history, contemporary standards tolerate the punishment—rape was punished with death under the common law and many jurisdictions, through the middle of this century, sanctioned the death penalty for rape. Although few jurisdictions presently sanction the death penalty for rape, the result does not necessarily follow that they do not because the penalty is inconsistent with contemporary values. Of the sixteen states that sanctioned the death penalty for rape prior to *Furman v. Georgia*, eleven thereafter enacted capital punishment laws that are probably deficient when tested by *Woodson v. North Carolina*. As rape is generally viewed as less serious than murder, for the states that did not re-enact capital rape statutes, the deletion is no doubt attributable to *Furman* and not to a perception that contemporary values had changed. If measured by jury reaction, contemporary standards tolerate the death penalty for rape—while the number of death verdicts for rape is small, that in five states 30 rapists have been sentenced to death since *Furman v. Georgia* is consistent with the view that the penalty is appropriate in extreme cases.

ARGUMENT

I. Eighth Amendment Challenges: Some General Observations

We need not belabor the point of the presumptive constitutional validity of the statutes presently before the Court.[14] A few observations, however, are in order.

[14] *See, e.g., Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2926 (1976) (plurality opinion).

As in prior cases, the issue before the Court is not the wisdom of capital punishment, but rather the constitutionality of the punishment for a particular class of crime. *Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting). While the Cruel and Unusual Punishments Clause is a check on the exercise of state legislative power, *Robinson v. California*, 370 U.S. 660 (1962), as long as a punishment "is not cruelly inhumane or disproportionate to the crime involved," the Clause does not dictate that a less severe punishment must be utilized to the exclusion of a more severe one. *Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2926 (1976) (plurality opinion).

The power to punish must also be "exercised within the limits of civilized standards," *Woodson v. North Carolina*, ____ U.S. ____, 96 S. Ct. 2978, 2990 (1976) (plurality opinion), *quoting Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). One objective measure of contemporary civilized standards is the expression of the legislative judgment.

The most recent expression of legislative judgment pertaining to capital punishment occurred subsequent to *Furman v. Georgia*, 408 U.S. 238 (1972). It is apparent from the post-*Furman* statutory enactments that contemporary society does not reject capital punishment per se. Because of the variations in the statutory responses,[15] however, it becomes more difficult to glean further insight from them in assessing contemporary standards. Apart from their acceptance of capital punishment, the enactments otherwise are probably best viewed as responding to the intricacies of *Furman*

[15] *See*, Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. R. 1690 (1974).

and not to any change in societal values. *Cf. Woodson v. North Carolina*, ___ U.S. ___, 96 S. Ct. 2978, 2988-2989 (1976) (plurality opinion). Thus, beyond a general acceptance of capital punishment, the reliability of the post-*Furman* enactments as a measure of contemporary values is somewhat diminished.

With these observations in mind, we now consider whether the punishment of death for rape is always an unconstitutionally excessive punishment. We will then address the issue of whether the punishment of death for rape is consistent with evolving standards of decency.

II. Death For Rape: Is It Always Unconstitutionally Severe And Disproportionate?

As an abstract issue, the penalty of death for murder does not run afoul of the Eighth and Fourteenth Amendments; yet, if the procedural mechanisms utilized by a state in imposing a death sentence for murder fall outside "contemporary" or "civilized" standards, the punishment yields to these amendments. *Gregg v. Georgia*, ___ U.S. ___, 96 S. Ct. 2909, 2922-2932, 2949-2950 (1976); *Woodson v. North Carolina*, ___ U.S. ___, 96 S. Ct. 2978, 2983-2990 (1976) (plurality opinion). The initial abstract question must also be answered here: Is the penalty of death for rape contrary to the Eighth and Fourteenth Amendments in all circumstances? [16]

[16] Although he responds affirmatively, the petitioner never really addresses the abstract issue; the structure of his brief discloses an apparent belief that he must only show that "evolving standards of decency" eschew death as a penalty for rape. *But see Woodson v. North Carolina*, ___ U.S. ___, 96 S. Ct. 2978, 2993 (Rehnquist, J., dissenting).

Whether, in the abstract, death is an impermissibly excessive penalty for rape requires a dual inquiry. Does the penalty exact a needless and inhumane suffering? *Gregg v. Georgia*, ___ U.S. ___, 96 S. Ct. 2909, 2925 (1976) (plurality opinion), *citing Furman v. Georgia*, 408 U.S. 238, 392-393 (1972) (Burger, C. J., dissenting). Is the penalty grossly disproportionate to the severity of the crime? *Gregg v. Georgia*, ___ U.S. ___, 96 S. Ct. 2909, 2925 (1976) (plurality opinion), *citing Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (dictum), and *Weems v. United States*, 217 U.S. 349, 367 (1910).

The inhumaneness *vel non* of a particular punishment is probably best analyzed in terms of whether the punishment can be said to rationally serve the interest of the state in controlling crime. Disproportionality is a more elusive, somewhat intuitive,[17] concept. Each concept is considered *seriatim* below.

A. Inhumaneness as an Absence of Justification

The social purposes served by capital punishment have been thoroughly discussed in prior cases. Thus, it is unnecessary to more than briefly canvass the interests which a state seeks to promote when punishing violators of its most serious penal laws. The interests already explored range from retribution[18] and deter-

[17] *See Furman v. Georgia*, 408 U.S. 238, 280 n. 24 (1972) (Brennan, J., concurring).

[18] *E.g., Gregg v. Georgia*, ___ U.S. ___, 96 S. Ct. 2909, 2930 (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 394-395 (Burger, C. J., dissenting).

rence[19] to the encouragement of guilty pleas and simply economy.[20]

Suffice it to say that here, as in previous cases, Georgia relies upon retribution and general deterrence as a justification for imposing the punishment of death on some rapists. But Georgia also relies heavily upon specific deterrence, or incapacitation,[21] as a justification.

Retribution. We initially observe that while "[r]etribution . . . [may] no longer [be] the dominant objective of the criminal law," *Williams v. New York*, 337 U.S. 241, 248 (1949), it remains a "principal" objective.[22]

The principle of *lex talionis* is perhaps the cornerstone of one of the basic arguments that death should be imposed, if at all, only when the offender has taken a life. *Cf. Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari; second rhetorical question). But the Eighth Amendment did not enact the ancient biblical command and as Professor Packer notes, the command "is not an ideal that is likely to appeal strongly to judges [or anyone] who entertain[s] views generally applauded as enlightened and progressive."[23]

[19] *E.g., Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2930-2931 (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 345-354 (Marshall, J., concurring), 454-455 (Powell, J., dissenting).

[20] *Furman v. Georgia*, 408 U.S. 238, 355-357 (Marshall, J., concurring).

[21] *See Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2930 n. 28 (plurality opinion); *Roberts v. Louisiana*, ____ U.S. ____, 96 S. Ct. 3001, 3016 (White, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 355 (Marshall, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 111 (Brennan, J., concurring).

[22] *See* Carlson, *Corrections in the United States Today: A Balance Has Been Struck*, 13 Am. Crim. L. Rev. 615, 628 (1976).

[23] Packer, *Making the Funishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1078-1079 (1964).

While the concept of retribution might at first blush appear to be a more valid justification for the supreme penalty when a murderer takes a life, the fact nevertheless remains that some rapes are committed in such a horrid manner as to evoke the rightful indignation of the public.[24] Moreover, it does not take much imagination to envision extreme cases of rape that call for a greater degree of public condemnation than for many, if not most, murders.[25] Simply put, the public expression of indignation through sentencing provides a rational alternative to "self-help, vigilante justice, and lynch law," *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring), and is as applicable to rape as murder. *Id.* at 459 (Powell, J., dissenting).

General deterrence. While the debate over the effectiveness of capital punishment as a deterrent to the commission of capital crimes continues,[26] it now seems settled that the question must be answered legislatively and not judicially. *Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2931 (1976) (plurality opinion); *Roberts v. Louisiana*, ____ U.S. ____, 96 S. Ct. 3001, 3017 (1976) (White, J., dissenting). Certainly, less is known about

[24] Some rapes that, in comparative terms, are not particularly abusive and degrading may similarly trigger public indignation if the character of the offender is also considered – for example, those committed by the incorrigible recidivist. Recidivism will be developed more fully when we address specific deterrence. *See* pp. 12-14 *infra*.

[25] In recent years over two-thirds of all murders have not involved other felonious activities. FBI, CRIME IN THE UNITED STATES 1975, at 18-19 (1976).

[26] *See, e.g.*, Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 Yale L. J. 187 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 Am. Econ. Rev. 397 (1975); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 Yale L. J. 359 (1976).

the efficacy of the death penalty as a deterrent to rape than about the death penalty deterring murder; deterrence studies almost always focus on homicide. But if less is known about deterrence vis-a-vis rape, the more important it becomes to resolve the issue in the legislative forum.

Georgia, of course, has no interest in executing all rapists. We do have an interest, however, in reducing the incidence of rape wherein the victim suffers serious physical and emotional injury; we do have an interest in reducing recidivism among rapists. Our legislature has not acted "blindly and arbitrarily" (Petitioner's Brief, at 36) in providing that some rapists may be punished with death; our legislature was free to rationally conclude that the fear of death may deter, if not all would-be rapists to some extent, at least those rapists inclined to commit especially sordid and abusive deeds [27] and those predisposed to repetitive acts of violence.[28]

Specific deterrence or incapacitation. Recidivism among offenders continues to be a grave problem.[29] The problem is especially serious if the offender is prone to violence. Professor Packer asks, "What are we to do with those whom we cannot reform and, in particular,

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[27] *See* Ga. Code Ann. §27-2534.1(b)(7) (Supp. 1976) (aggravating circumstances):

> "The offense of . . . rape . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

[28] *See* Ga. Code Ann. §27-2534.1(b)(1) (Supp. 1976) (aggravating circumstances):

> "The offense of . . . rape . . . was committed by a person with a prior record of conviction for a capital felony. . . ."

[29] *See, e.g.*, Carlson, *Corrections in the United States Today: A Balance Has Been Struck*, 13 Am. Crim. L. Rev. 615, 627-628 (1976).

those who by our failure are thought to remain menaces to life?" Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1081 (1964).

Georgia recognizes that for certain violence-prone recidivists, undeterred by the fear of death, incapacitation is an answer, perhaps the best answer. *See* Ga. Code Ann. §27-2534.1(b)(1) (Supp. 1976).[30] Other states, as well as the Model Penal Code, similarly recognize that violent recidivism is a legitimate "aggravating" circumstance. *See, e.g.*, Fla. Stat. Ann. §921.141(5)(b) (1974 Rev.); Model Penal Code §210.6(3)(b) (Proposed Official Draft, 1962). In at least one state, it must be shown that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" before a sentence of death can be imposed. Texas Code Crim. Proc., Art. 37.071(b)(2) (Supp. 1975-1976).

In terms of the incorrigible recidivist who has a demonstrated proclivity for violence, such as rape, the concept of total incapacitation (*i.e.*, execution) should not constitutionally turn upon whether the defendant took a life in the most recent act of rape for which he stands convicted. Stated in another fashion, must society wait until the defendant perhaps murders his next victim before they are constitutionally permitted to save the life of that victim and others by totally incapacitating the defendant?[31] The irrelevancy of

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[30] *See* note 28, *supra*.

[31] As noted by Mr. Justice White in *Roberts v. Louisiana*, _____ U.S. _____, 96 S. Ct. 3001 (1976), "death finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not." *Id.* at 96 S. Ct. 3016 (White, J., dissenting).

whether the defendant has taken a life in his most recent offense is reinforced by the widely accepted view that "the strongest case for severe measures of incapacitation are not murderers as a group (their offenses are often situational) but rather those who have repeatedly engaged in violent combative behavior." [32]

To conclude, some rapists have demonstrated not only that they will likely continue to be rapists but also that they will likely continue to kill or seriously injure those whom they rape. When these rapists are identified, it should be constitutionally permissible to execute them.

Conclusion. The Georgia legislature has determined that, in some cases of rape, death should be an available sanction. The concepts of retribution, deterrence, and incapacitation justify the imposition of death as a sanction for rape in extreme cases for most of the same reasons that justify the imposition of death as a punishment for murder in some cases. While each concept, or justification, has been examined independently, it hardly needs to be observed that the justifications, while standing alone, are certainly not mutually exclusive.

Based as it is on concepts of retribution, deterrence, and incapacitation, the legislative determination that some rapists should be punished with death can hardly be said to be irrational or without justification. As the punishment of death for rape is not without some justification, the punishment is not "unnecessarily cruel." *Cf. Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2929-2931 (1976) (plurality opinion).

[32] Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1080 (1964).

We now turn to disproportionality.

B. Disproportionality

"[R]ape . . . is indisputably a grave crime, deserving stringent punishment."

—Petitioner's Brief, at 35.

As noted earlier, disproportionality as a measure of "excessiveness" is an elusive concept. *See* page 9, note 17, *supra*. In *Furman v. Georgia*, Mr. Justice Brennan commented upon Mr. Justice Fields' apparent "intuitive sense" of disproportionality in *O'Neil v. Vermont*.[33] *Furman v. Georgia*, 408 U.S. 238, 280 n. 24 (Brennan, J., concurring). While concluding that the "disproportionality test may not be used . . . to strike down the death penalty for rape altogether," Mr. Justice Powell suggested that the test was perhaps best utilized on a case by case basis. *Furman v. Georgia*, *supra*, 408 U.S. at 461 (Powell, J., dissenting). More recently, in *Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909 (1976), three members of the Court simply held that the punishment of death was not "invariably disproportionate" when the crime is murder and the defendant has wilfully taken a life. 96 S. Ct. at 2932 (plurality opinion).

Historically, rape has been punished as a capital offense in many jurisdictions. When *Furman* was decided, rape was a capital offense in sixteen states. While some courts may have occasionally vacated a death sentence for rape on the basis that the penalty was too excessive under the facts of the particular case before the court, *see Ralph v. Warden*, 438 F. 2d 786 (4th Cir. 1970), *cert. denied* 408 U.S. 942 (1972); *Calhoun*

[33] 144 U.S. 323, 340 (1892). (Fields, J., dissenting).

v. State, 85 Tex. Cr. 496, 503, 214 S.W. 335, 338 (1919), it does not appear that any court has ever decreed that the death penalty for rape, regardless of the circumstances of the crime and the character of the offender, is always unconstitutionally disproportionate.

Upon reflection, the reason for the absence of any unilateral decree is not difficult to fathom—some rapes involve such depraved sexual abuse and the infliction of such serious physical injury that extreme sanctions are necessary. If the perpetrator has a history of similar behavior, extreme sanctions are all the more in order. A rape involving the circumstances described no doubt ranks higher on the public's "scale of seriousness" than many, if not most, murders. *See* page 11, note 25, *supra*.

The petitioner concedes (Petitioner's Brief, at 35), as he must, that the "concept of . . . [disproportionality] does not require that the punishment fit the crime with mathematical precision." Otherwise, in the context of capital punishment, we have established a contemporary form of *lex talionis*. Too, it bears repeating that a punishment for a particular crime fails to measure up to the proportionality standard only if it is *grossly* disproportionate.

The punishment of death for rape, under any and all circumstances, is simply not so disporportionate to the crime as to be unconstitutionally excessive. *Furman v. Georgia*, 408 U.S. 238, 393 n. 18 (1972) (Burger, C. J., dissenting). To be sure, death for rape is an extreme sanction, suitable for those cases that can only be described as extreme.

Before turning to the issue of whether the punishment of death for any rape is consistent with "evolving

standards of decency," brief mention should be made of Georgia's unique statutory disproportionality review.

By providing the death penalty as a permissible punishment for rape, Georgia obviously has concluded that the penalty is not always disproportionate to the crime. But Georgia is not oblivious to the concept of proportionality; our Supreme Court has been mandated, in each case where a sentence of death has been imposed, to determine:

> "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, *considering both the crime and the defendant.*"

Ga. Code Ann. §27-2537 (c) (3) (Supp. 1976) (emphasis added). Thus, death sentences are vacated for "crime[s] technically falling within the legislatively defined class but factually falling outside the likely legislative intent in creating the category." [34]

III. Evolving Standards Of Decency And Rape As A Capital Offense: Is The Evolutionary Process At An End?

The petitioner's position is simply that "evolving standards of decency"—assessed through traditional usage, legislative enactments, and jury determinations—condemn death as a disproportionate punishment for rape. As we will demonstrate, however, the objective indicators of contemporary values upon which the petitioner relies, do not support the conclusion he reaches.

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[34] *Furman v. Georgia*, 408 U.S. 238, 461 (1972) (Powell, J., dissenting). *See Coley v. State*, 231 Ga. 829, 204 S.E. 2d 612 (1974).

A. History and Traditional Usage

The petitioner perceives a trend to abolish death as a punishment for rape based on the fact that few states [35] presently sanction the penalty. For reasons that will become apparent when we discuss legislative enactments, we cannot agree.

Suffice it to say that rape was a capital crime under the common law,[36] that rape was a capital crime in seventeen states in 1919,[37] and that rape was a capital crime in sixteen states when *Furman* was decided. There is simply no "trend" shown; tradition and history sanction death as a punishment for rape.

B. Legislative Enactments

The petitioner makes his strongest and most forceful argument when he asserts that the "minuscule" number of states making rape a capital crime in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), is evidence of the contemporary repudiation of death as a punishment for rape. Petitioner's Brief, at 37. But the petitioner's argument necessarily assumes that the post-*Furman* enactments resulted from a societal rejection of death as a punishment for rape and not from *Furman* itself. For this reason, the argument is flawed.

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[35] Apparently six: Fla. Stat. Ann. §794.011 (1976 Rev.); Georgia; La. Rev. Stat. Ann. §14:42 (1974); Miss. Code Ann. §97-3-65 (1974); N.C. Gen. Stat. §14-21 (Cum. Supp. 1975); Tenn. Code Ann. §39-3702 (1975). As the petitioner notes, in Florida, Mississippi, and Tennessee the crime is made capital only if the victim is of tender years, and *Woodson v. North Carolina*, _____ U.S. _____, 96 S. Ct. 2978 (1976), has no doubt rendered all but the Florida and Georgia statutes unconstitutional.

[36] *See* H. BEDAU, THE DEATH PENALTY IN AMERICA, 1-2 (rev. ed. 1967).

[37] BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 11-12 (1919).

The legislative reaction to *Furman* can perhaps best be described as being as diverse as the concurring opinions that made the majority. *See*, Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. R. 1690 (1974). Of the sixteen states that punished rape as a capital crime prior to *Furman*, eleven later enacted general capital punishment statutes that are at least arguably suspect in light of *Woodson v. North Carolina*, ___ U.S. ___, 96 S. Ct. 2978 (1976).[38]

Rape, *as a class* of crime, is no doubt generally viewed as less serious than murder.[39] Thus, it is not surprising that those states opting for so-called mandatory statutes eliminated rape as a capital crime entirely or else retained rape as a capital crime in only narrow circumstances. About all that can be said about the legislatures that enacted these statutes is that they apparently read *Furman* as requiring mandatory sentencing; given a choice between executing all rapists and executing none, or almost none, the legislatures opted for executing none. The choice says little in terms of society suddenly rejecting the death penalty for rape. *Cf. Woodson v. North Carolina*, ___ U.S. ___, 96 S. Ct. 2978, 2988-2989 (1976) (plurality opinion). For similar reasons, those legislatures enacting discretionary statutes, but eliminating rape as a capital crime, likely perceived

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[38] Ky. Rev. Stat. §507.020 (1975); La. Rev. Stat. Ann. §14:30 (1974); Md. Code Ann., Art. 27 §413 (Supp. 1976); Miss. Code Ann. §§97-3-19, 97-3-21, 97-25-55, 99-17-20 (Cum. Supp. 1975); Vernon's Mo. Stat. Ann. §§559.005, 559.009 (Supp. 1976); Nev. Rev. Stat. §200.030 (1975 Rev.); N.C. Gen. Stat. §§14-17, 14-21 (Cum. Supp. 1975); 21 Okla. Stat. Ann. §§701.1-701.3 (Supp. 1975); S.C. Code Ann. §16-52 (Supp. 1975); Tenn. Code Ann. §§39-2402, 39-2406, 39-3702 (1975); Va. Code Ann. §§18.2-10, 18.2-31 (1975 Rev.).

[39] Specific instances of rape, however, are often *more* serious than many murders. *See* page 11, *supra*.

that *Furman* required a narrowing of the overall process whereby some offenders are sentenced to death and others, convicted of similarly defined crimes, are not. That some states may have narrowed the definitions of crimes more than was constitutionally necessary, and eliminated some crimes entirely, tells us little about societal rejection of death as a punishment for rape.

The varied legislative responses to *Furman* are hardly an accurate assessment of contemporary standards *as they pertain to rape*. An examination of the legislative enactments existing at the time of the *Furman* decision would no doubt provide a more reliable assessment; after all, the standard had remained relatively constant for fifty years.

In terms of his reliance on statutes that *presently* sanction the death penalty for rape, the petitioner has overstated his contemporary standards argument. The legislative response to *Furman* is simply no basis upon which to conclude that contemporary society rejects death as a punishment for all rapes.

C. Jury Determinations

The petitioner perceives the fact that only three defendants are now under a sentence of death in Georgia as a "clear indication that death as a punishment for rape has been publicly repudiated by [our citizens]." [40] Petitioner's Brief, at 44.

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[40] Two other rape defendants were sentenced to death by juries under the procedures enacted by Ga. Code Ann. §27-2534.1 (Supp. 1976). In one case the sentence was vacated as disproportionate. *Coley v. State*, 231 Ga. 829, 204 S.E. 2d 612 (1974). In the other, the sentence was vacated on *ex post facto* grounds. *Akins v. State*, 231 Ga. 411, 202 S.E. 2d 62 (1973).

The petitioner also notes that, subsequent to *Furman* and prior to *Gregg*, fourteen defendants were sentenced to death for rape in Louisiana and eight defendants in North Carolina were sentenced to death. Petitioner's Brief, at 44. The petitioner further informs us that two persons have been condemned to die under Florida's sexual battery law and that one defendant was sentenced to death in Mississippi. *Id.* at 42 n. 40.

That thirty rapists have been sentenced to death since *Furman* suggests the opposite conclusion from that reached by the petitioner. Far from the "public repudiation" perceived by the petitioner, the jury, as the collective conscience of the community, views the death penalty as a necessary punishment.

When the number of death verdicts in rape cases are compared with the number of lesser verdicts, the latter obviously constitute a larger percentage. In this context, death verdicts may be said to be infrequent. But the relative infrequency of death verdicts in rape cases does not mean that the punishment is now condemned by contemporary society in *all* cases.

First, just as in murder cases, jury reluctance is no doubt attributable to a "humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." *Gregg v. Georgia*, ____ U.S. ____, 96 S. Ct. 2909, 2929 (1976) (plurality opinion). Secondly, rape is generally perceived to be, although a serious offense, less serious than murder. Thus, it can be expected that far fewer specific instances of rape will be viewed by juries as so serious as to require a death verdict. It is the extreme cases for which death is warranted and imposed. The evidence upon which the petitioner relies does not show otherwise.

Brief mention should be made of the petitioner's effort to minimize the extremity of his own offense by comparing his case with others that are, in his words, "far more aggravated." Petitioner's Brief, at 45. The petitioner lists five cases: *Welch v. State*, 237 Ga. 665, 229 S.E. 2d 390 (1976); *Woodard v. State*, 234 Ga. 901, 218 S.E. 2d 629 (1975); *Zilinmon v. State*, 234 Ga. 535, 216 S.E. 2d 830 (1975); *Crowder v. State*, 233 Ga. 789, 213 S.E. 2d 620 (1975); and *Hammock v. State*, 233 Ga. 733, 213 S.E. 2d 618 (1975).

While the physical harm suffered by the victims in the above cases was no doubt greater than the observable harm suffered by Elnita Carver, the petitioner ignores his demonstrated propensity to commit violent acts of rape.[41] The records in the cases relied upon by the petitioner reflect that the defendants in four of the cases did have prior convictions. But none of the defendants had a prior capital conviction much less a prior rape (or any sex offense) conviction.

The petitioner's effort to demonstrate the similarity of his case to that of Jessie Coley (*Coley v. State*, 231 Ga. 829, 204 S.E. 2d 612 (1974)) fails for essentially the same reasons.

Coley and the petitioner each committed a rape (without much other observable harm to the victim) [42] after escaping from prison and each had a prior conviction for a capital felony. While the prior capital conviction

[41] The promptness with which he was apprehended after fleeing with Ms. Carver perhaps saved her from a fate similar to that of Susan Jones (A. 306, 310) or, worse, Sue Ann Wick. (A. 308).

[42] The "torture" present in *Coley*, alluded to by the petitioner at page 45 of his brief, involved locking the victim in the trunk of an automobile. *Coley v. State*, *supra*, 231 Ga. at 839, 204 S.E. 2d at 619.

is a point of similarity, at the same time, it also distinguishes the two defendants. Coley had previously committed an armed robbery (for which he was sentenced to nineteen years imprisonment); the petitioner, of course, had previously raped two other victims and had murdered one.

These two cases demonstrate why an aggravating circumstance, such as a prior capital conviction,[43] is simply a prerequisite to the imposition of the death penalty, not a death knell in itself. The cases also reflect the wisdom of proportionality review. *See* Ga. Code Ann. §27-2537(c)(3) (Supp. 1976).

The jury, as a reflector of contemporary values, does not reject capital punishment for rape in all cases. The available evidence suggests that the punishment will continue to be imposed in extreme cases.

D. Summary

Tradition and history support the retention of the death penalty for rape. While few states made rape a capital offense subsequent to *Furman v. Georgia*, the legislative enactments were in large measure responsive to *Furman* rather than society's sudden rejection of the death penalty for rape. With the caveat that the enactments demonstrate an acceptance of capital punishment as a general proposition, they offer little assistance in determining whether the death penalty for rape is otherwise rejected. Jury reaction, however, demonstrates that the death penalty for rape is consistent with contemporary standards in extreme cases.

[43] Ga. Code Ann. §27-2534.1(b)(1) (Supp. 1976); *see* n. 28, *supra*.

It may be that at some future date the question posed at the beginning of this section will be answered affirmatively. But that day is not yet here. Today, based on two objective indicators of contemporary values, the question must be answered: "No." For extreme cases death is a necessary and appropriate response.

CONCLUSION

Based on the character and record of the petitioner, his sentence of death for rape is not a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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